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Nos. 85-1239, 85-1406

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR; and
THE UNITED STATES DEPARTMENT OF THE INTERIOR,
AMOCO PRODUCTION COMPANY, et al.,

Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DONALD P. HODEL, SECRETARY OF THE INTERIOR; and
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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti oppose the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

This case involves the hunting and fishing rights of Alaska's aboriginal people. The plaintiffs, here the respondents, seek to ensure that the statutory and common law protections for these

rights are applied fairly and consistently. Three in number, they are the tribal village of Gambell, the tribal village of Stebbins, and Nunam Kitlutsisti. The tribal villages of Gambell and Stebbins are federally recognized Indian Tribes organized under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The village of Gambell is located on St. Lawrence Island, an island located near the Soviet Union in the Bering Sea. The village of Stebbins is located on the northeastern shore of the Yukon River Delta, bordering Norton Sound. Nunam Kitlutsisti is an intertribal organization representing 56 villages in the Yukon-Kuskokwim Delta. Literally the "defender of life and land," its purpose is to promote and protect the traditional hunting and fishing rights of its members.

All legal questions presented by this case involve two statutes. One is the Alaska Native Claims Settlement Act.[1] The other is Title VIII of the Alaska National Interest Lands Conservation Act.[2] Both affect the hunting and fishing rights of Alaskan Natives. The Claims Settlement Act extinguished Alaska Native aboriginal hunting and fishing rights "in Alaska." Title VIII of the Conservation Act protects the hunting and fishing rights extinguished by the Claims Act. Described as a "'settlement' of the Alaska Native aboriginal hunting and fishing rights seemingly extinguished by ANCSA,"[3] the Conservation Act protects Native hunting and fishing rights "in Alaska."

That these issues arise in a challenge to two OCS lease sales is both fitting and proper in light of the extensive use of sea areas by Alaska's aboriginal people. For about half the year, water up to 65 miles from the Arctic coast is frozen solid. During this period the Eskimo treat the ice as a mere extension of land. They build roads on the ice. They set up camps on it. Most importantly, they hunt and fish on it.[4] In fact, the ice and water have

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[1] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. § 1601 et seq.

[2] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.*

[3] D. Case, ALASKA NATIVES AND AMERICAN LAWS 299 (1984).

[4] R. Nelson, HUNTERS OF THE NORTHERN ICE (1969).

traditionally yielded more resources to the Eskimo than the land. Along the Arctic coast the land is largely devoid of trees and other natural resources which can be used for housing or fuel. As a result, the Eskimo have relied on the sea to provide them with most of their food, clothing, fuel, and the basic materials for making hunting equipment such as kayaks and harpoons.[5] Immensely important, the sea is so central to the Eskimo that they recognize no sharp distinctions between land and water.

The hunting and fishing which occur in the coastal ice and water are critical to the well being of Alaskan Natives. Although the thought of fishing and hunting for one's sustenance may be a quaint anachronism for an industrial society, in rural Alaska it is a daily reality. There, cultural forces and lack of integration into the Western cash economy join together to make subsistence hunting and fishing the prime focus of life.

Subsistence is loosely defined as the harvest of wild resources to provide food and raw materials for personal use, sharing, and distribution to kin, in accordance with established custom and tradition.[6] A cyclical process, it begins when Alaskan Natives harvest fish and game. It continues as they directly consume it, share it, exchange it on local trade networks, or sell it for cash. Cash is then used to buy hunting and fishing equipment, with the process being completed when that equipment is used in further harvesting efforts. Large mammal hunting communities, such as Gambell and Savoonga on St. Lawrence Island, also obtain the cash needed to pursue their subsistence activities through the carving and sale of marine mammal by-products including whale bone, walrus ivory and oosiks, and baleen.[7]

Subsistence activities are indispensable to the economic well-being of the Native inhabitants of western Alaska and the Bering

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[5] *Id.*; N. Chance, THE ESKIMO OF NORTH ALASKA 9 (1966).

[6] *See* R. Little and L. Robbins, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: ST. LAWRENCE ISLAND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 89 (June 1984) (hereafter LITTLE AND ROBBINS). *See also* 16 U.S.C. § 3113 (defining "subsistence uses" for the purposes of the Conservation Act).

[7] LITTLE AND ROBBINS at 291-92.

Sea region.[8] Rural Native Alaskans have little access to the cash economy. Few can find jobs, for industry does not exist. Cash incomes must come from occasional wages, state or federal transfer payments, or a combined strategy in which one member of the family works while another hunts and fishes.[9]

Although Natives in rural Alaskan communities have limited incomes, living in the Bush is very expensive. The high cost of living is largely attributable to transportation costs. Distances between villages and regional centers are great; roads do not exist; weather conditions range between harsh and impossible. Goods must be transported by airplane or barge over great distances in inclement weather. Both methods are extremely expensive, and barges cannot operate in winter months when ports are frozen shut.

The net result of low incomes and a high cost of living is poverty. Native Alaska constitutes a Third World within the United States. Many Native Alaskans are fluent only in their native tongue, and most live under conditions unknown elsewhere in the United States. The poverty here is broad and deep. In 1978, the per capita income in the Norton Sound region (Wade Hampton) was only 16% of the average United States per capita income.[10] In practice, this poverty translates into a lack of social amenities such as bathrooms, running water, telephones, and standard housing.

Alaskan Natives have traditionally relied upon subsistence hunting and fishing to overcome this lack of economic opportunity. Because Alaskan Natives cannot afford to buy food, they must catch or kill it. Most western Alaskan Natives depend on the subsistence harvest of fish, marine mammals, birds, whales,

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[8] See generally LITTLE AND ROBBINS; A. Fienup-Riordan, NAVARIN BASIN SOCIOCULTURAL SYSTEMS ANALYSIS, Alaska OCS Socioeconomic Studies Program, Technical Report No. 70 (January 1982).

[9] *See, e.g.*, State of Alaska House Research Agency, PERSONAL INCOME IN THE LOWER YUKON-KUSKOKWIM REGION.

[10] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT. PROPOSED OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE 57, NORTON SOUND (1982) (hereafter FEIS) at Table III.B.4.13.

and other foods found locally, as their ancestors did for as long as the region has been humanly occupied.[11]

The importance of subsistence hunting and fishing to the economic viability of rural Native Alaskan communities can be understood by comparing cash incomes to the value of subsistence harvests. The value of food secured by subsistence hunting and fishing frequently exceeds cash incomes. In 1976, the annual value of a subsistence harvest for a family of four in western Alaska was $13,000. At the same time, the average cash income for the same family was approximately $5,263.[12] As this example indicates, Alaskan Natives could not feed their families should their subsistence activities be significantly disrupted.

In addition to its economic importance, subsistence hunting and fishing is central to the Eskimo's cultural survival.[13] To an Eskimo, language, culture, spiritual beliefs, customs, and respect for others and for oneself are all tied into a holistic worldview centered around the traditional hunting, fishing, and gathering way of life.[14] Hunting and fishing, sharing the harvest with family and fellow villagers, and acting as a harmonious part of the ecosystem are critical life activities.[15] Because subsistence is crucial, moderate or large-scale disruptions of subsistence activities are likely to result in significant adverse changes in the cultural well-being and stability of western Alaskan Native communities.[16]

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[11] FEIS at 47-48.

[12] R. Wolfe, AN ECONOMIC ANALYSIS OF FOOD PRODUCTION IN A WESTERN ALASKA COMMUNITY 23 (August 1977).

[13] FEIS at 48-49.

[14] *Id.*

[15] *Id.*

[16] LITTLE AND ROBBINS at Chapter XV; J. Jorgensen, EFFECTS OF RENEWABLE RESOURCE HARVEST DISRUPTIONS ON SOCIOECONOMIC AND SOCIOCULTURAL SYSTEMS: NORTON SOUND, Alaska OCS Socioeconomic Studies Program, Technical Report No. 90 (January 1984) at 327-354; *Village of Gambell v. Hodel*, 774 F.2d 1414, 1425 (9th Cir. 1985).

Congress has historically recognized the importance of subsistence harvests for Alaskan Natives.[17] This concern has been most recently expressed in Title VIII of the Conservation Act, a statute whose genesis can be traced to the Alaska Statehood Act. Passed in 1959, the Statehood Act provided that the State of Alaska could select up to 102.5 million acres of land — more than one-fourth of the State's 375 million acre land area.[18] Although the Statehood Act expressly provided that it would not affect existing Native claims, the expectations were that many of the State's selections would include traditional Native hunting and fishing grounds and that the State's selection process would *de facto* eliminate Native claims.[19]

Spurred into action by the Statehood Act, Native groups formed the Alaska Federation of Natives (AFN) in 1966. Upon formation, the AFN convinced Secretary of the Interior Stewart Udall to freeze state land selections until such time as the Native land claims were resolved. The freeze was upheld by the Court of Appeals for the Ninth Circuit in *Alaska v. Udall,* 420 F.2d 938 (9th Cir. 1969). It was continued under the Nixon administration by Secretary of the Interior Walter Hickel.[20]

Discovery of the Prudhoe Bay oilfield ultimately precipitated a settlement of Native land claims. When oil was discovered on the North Slope in 1965, the oil companies believed they needed a Trans-Alaska oil pipeline to get the oil to market. Their initial attempts to construct the pipeline were blocked, first by an environmental lawsuit and then by a suit filed by the Alaskan Natives. *Native Village of Allakaket v. Hickel,* Civil No. 705-70 (D. D.C. 1970). In this latter case, the District Court for the District of Columbia ruled that an Alaskan Native Indian Reorganization Act Association held possessory claims to land in the Yukon River Valley based on aboriginal hunting and fishing

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[17] *See* D. Case, ALASKA NATIVES AND AMERICAN LAWS at Ch. 7 (1984).

[18] J. Hanrahan and P. Gruenstein, LOST FRONTIER: THE MARKETING OF ALASKA 94 (1977).

[19] *Id.*

[20] *Id.* at 95.

rights, and that the Secretary of the Interior could not lease or otherwise dispose of that land without the Natives' consent.

A land claims settlement quickly followed this decision. Once the oil companies realized they could not build a pipeline without first settling the issue of Native claims, they lobbied heavily for an Alaskan Native land claims settlement.[21] With the support of the Nixon administration, but in the face of opposition from various environmental organizations, the oil industry and the Alaskan Natives secured the passage of the Alaska Native Claims Settlement Act in 1971.[22]

The heart of the Claims Act was the establishment of thirteen regional corporations and various village corporations. The Act awarded the regional and village corporations three major forms of compensation: a monetary settlement; rights to future payments from oil, gas, and mineral leases; and 40 million acres of unallocated federal lands. 43 U.S.C. § 1603; *Village of Gambell v. Clark,* 746 F.2d 572, 578-79 (9th Cir. 1984).

The *quid pro quo* was that Congress extinguished all Native claims "in Alaska." Sections 4(a), 4(b), and 4(c) of the Claims Act provide:

> (a) All prior conveyances of public land and water areas *in Alaska,* or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title *in Alaska* based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the state, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas *in Alaska,* or

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[21] M.C. Berry, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE CLAIMS 23, 163 (1975).

[22] J. Hanrahan and P. Gruenstein, *supra,* at 95.

> that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. §§ 1603(a), (b), and (c) (emphasis added).

The passage of the Claims Act was not expected to end federal protection of Native fishing and hunting rights. The land claims settlement was generous, but it had little relevance to most Alaskan Natives whose daily life revolved around hunting and fishing.[23] Recognizing this fact, Congress instructed the State of Alaska and the Secretary of the Interior to protect the subsistence needs of the Alaskan Native population.[24]

The protections did not materialize. Neither the Secretary nor the State of Alaska moved to protect the subsistence needs of Alaskan Natives. As a consequence, Congress was forced to act. It remedied the Secretary's and the State's misfeasance in 1980. Resurrecting language earlier deleted from drafts of the Claims Settlement Act,[25] it included in Title VIII of the Alaska National Interest Lands Conservation Act procedural and substantive protections for subsistence fishing and hunting.

The Senate Committee Report accompanying the Conservation Act describes why the statutory protections for subsistence hunting and fishing previously dropped from the Claims Settlement Act had to be placed in the Conservation Act. The report provides:

OVERVIEW

> Alaska's more than 200 rural villages are unique in that they are the last communities in the United States

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[23] *Id.* at 109.

[24] H. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2247, 2250.

[25] *Compare* S. 835, 92d Cong., 1st Sess. § 16(b)(1) (1971) *and* H.R. 7039, 92d Cong., 1st Sess. § 16(b)(1) (1971) *with* 16 U.S.C. § 3120.

in which a substantial number of residents are still dependent upon the harvest of renewable resources on the public lands for their sustenance. The importance of subsistence uses of such resources to the physical, economic and cultural well-being of Alaska Natives and other rural residents has been exhaustively chronicled in testimony presented at hearings, town meetings and workshops held by the committee during consideration of both the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act. The committee notes that the report of the Committee on Interior and Insular Affairs of the House of Representatives on H.R. 39 (House Report No. 95-1045, Part I, pp. 181-187) documents the importance of such uses in considerable detail.

HISTORY OF CONCERN

The Committee has had a long-standing concern for the protection of subsistence resources and uses in Alaska. In Section 21 of S.35, the Senate version of the Alaska Native Claims Settlement Act, the Secretary was directed to establish subsistence zones on the public lands, and, in circumstances in which subsistence resources or uses were threatened, to exercise his closure authority by prohibiting all consumptive uses of such resources within a zone except for subsistence uses by Alaska Natives. The conferees failed to adopt this provision in the conference report; however, the statement of the managers clearly established the intent of the Congress that the Secretary exercise his closure authority in a manner consistent with the purposes of Section 21.

S. Rep. No. 413, 96th Cong., 2d Sess. 230-31, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5174-75.

Title VIII implements this long-standing Congressional concern by providing a systematic and comprehensive scheme for protecting the hunting and fishing rights of Alaskan Natives.

The Act declares that "the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence...." 16 U.S.C. § 3112(1). It states that all leasing and other land use decisions must allow, to the maximum extent possible, "the opportunity for rural residents engaged in a subsistence way of life to do so." *Id.* To achieve these ends, the statute requires federal land managers to carefully evaluate the impact of leasing on subsistence uses and resources, and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence activities, the land manager, before issuing any leases, must insure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public land; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources. 16 U.S.C. § 3120(a)(1)-(3).

Congress insured that the protections provided by the Conservation Act would be widely available. The Act applies to all conceivable federal interests, placing "lands, waters, and interests therein" under its umbrage. 16 U.S.C. § 3102(1). The geographic coverage is similarly broad. Mirroring and applying coextensively with the Claims Settlement Act from which it was derived, the Conservation Act protects all federal lands "in Alaska." 16 U.S.C. § 3102(3).

After Congress passed the Conservation Act in 1980, Alaskan Natives expected that Secretary Watt would heed its statutory directives and take the steps necessary to insure that their subsistence uses would not be unreasonably compromised. Their expectations were destined to be disappointed. Rather than addressing the subsistence uses and needs of Alaskan Natives, Secretary Watt proceeded to ignore them. His attitude was illustrated by his reaction to suggestions that OCS leasing might seriously disrupt the subsistence activities of Alaskan Natives. Responding to these concerns, he adamantly insisted that "35,000 people on the edge of the world" would not influence his plans to lease the Alaskan OCS.[25]

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[25] The Wall Street Journal, March 12, 1986, at 64.

In practice, Secretary Watt expressed his refusal to consider the subsistence uses of Alaskan Natives in connection with his OCS leasing program in an inconsistent and unfair application of Title VIII of the Conservation Act and Section 4(b) of the Claims Settlement Act. The inconsistency began in *Inupiat Community of the Arctic Slope v. United States.*[27] There, Inupiat Eskimo asserted aboriginal title to OCS lands which they had traditionally used and occupied. To defeat these aboriginal claims, Secretary Watt and the oil companies took the position that the Claims Settlement Act abolished aboriginal hunting and fishing rights outside the territorial waters of the State of Alaska. Claiming that the term "in Alaska" comprehended the OCS and included all lands lying between the high tide mark and the two hundred mile limit, the Secretary argued that a technical interpretation restricting the term "in Alaska" to anything less than the two hundred mile limit would be "tortured." The oil companies — also parties in that case — alleged that Congress had intended the phrase to be geographically descriptive and that such a use was "a perfectly natural one."

After adopting the position that the Claims Act applied to the OCS, Secretary Watt then proceeded to openly ignore the requirements of Title VIII. His theory was premised on the assumption — remarkable in light of the position taken in *Inupiat Community* — that the Conservation Act could not be interpreted as extending beyond the State's territorial waters. Without holding hearings or otherwise opening the administrative process to any public comment, he concluded that the term "in Alaska" was technically descriptive and did not apply to the OCS.

The tribal villages of Gambell and Stebbins called into question Interior's attempt to create a gap in the protections for the subsistence uses of Alaskan Natives when they filed this case on March 4, 1983. Their claim was simple. The term "in Alaska" had to be construed consistently and fairly. As used in two sister statutes — the Claims Settlement Act and Title VIII of the Conservation Act — the term was either geographically or technically

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[27] 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S. Ct. 68 (1985).

descriptive. If geographically descriptive, Title VIII applied to OCS leasing. If technically descriptive, Alaskan Natives retained their aboriginal hunting and fishing rights beyond the State's territorial waters because such rights had not been extinguished by the Claims Settlement Act.

The suit placed Interior and the oil companies in the impossible position of justifying an illogical and inconsistent application of an identical term in two sister statutes. Their resulting responses lacked grace. Before the tribal villages filed *Gambell I,* the Secretary and the oil companies had vigorously contended in *Inupiat Community* that it was "clear and unambiguous" that the phrase "in Alaska" referred to a geographic area lying between the high tide mark and the two hundred mile limit. After *Gambell I* was filed, they contended that the phrase could not possibly have that meaning, and that it was — of all things — "clear and unambiguous" that the term referred to a limited geographic area lying between the three mile limit and the high tide mark.

On appeal, Secretary Watt and the oil companies found themselves in the awkward position of presenting contradictory reasons why the Claims Act and Title VIII should be construed inconsistently and unfairly. The oil companies argued that the meaning of the term "in Alaska" was clear and unambiguous and that it did not include the OCS. They admitted that neither sections 4(a) nor 4(b) of the Claims Act — the sections which abolished aboriginal title — applied to the OCS. Yet they argued that either paramount federal authority or section 4(c) of the Claims Act, a section which abolished legal claims "based on claims to aboriginal title ... in Alaska," did abolish such title.

Secretary Watt took an entirely different position. He disputed the oil companies' claim that the meaning of the term "in Alaska" was clear and unambiguous on its face. Arguing that the term was opaque and otherwise totally ambiguous, he contended that the construction of both statutes had to be resolved by their legislative history. That history, he further argued, demonstrated that Congress intended for the same term in the two sister statutes to have totally opposite meanings.

The Court of Appeals for the Ninth Circuit understandably rejected these claims. It chose the consistent and fair interpretation

urged by the tribal villages — that the same term in the two historically-linked statutes had the same meaning. Eschewing the alternative of reading the term technically, it held that the term was geographically descriptive, encompassing areas outside as well as inside the territorial waters of the State.[18] Because the court found the phrase to be geographically descriptive, it determined that the Claims Settlement Act extinguished Native hunting and fishing rights outside the three-mile limit as well as that Title VIII of the Conservation Act protected the same rights in the same area. 746 F.2d at 579, 582.

The court of appeals did not, however, void the sale. Rather than take this step — as urged by the tribal villages — it chose to remand the case to the trial court for a legal and factual determination as to the appropriate remedy for the violation of the Conservation Act's prescriptions. The action was requested by the Secretary and the oil companies. To avoid having the lease sale summarily voided, both the Secretary and the oil companies had contended that the tribal villages would be entitled to an injunction should the court hold that the Conservation Act applied to OCS leasing. The Secretary had argued that the proper remedy was to enjoin exploration until such time as he complied with the requirements of the statute. The oil companies had gone farther, claiming that "If this court should hold that § 810 of ANILCA applies to the OCS, the appropriate remedy would be ... to enjoin further activities until the Secretary completes the procedures required by the statute...." 774 F.2d at 1417. In response to these arguments, the appellate court remanded the matter back to the district court for the limited purpose of deciding whether the sale should be voided or whether further activities should be permanently enjoined. 746 F.2d at 582-83.

A preliminary injunction should have issued automatically on remand. The remand order directed the district court to either void Lease Sale 57 or to permanently enjoin further exploration and development until Interior complied with the Conservation Act. Pending that determination, a preliminary injunction

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[18] *See Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (*Gambell I*); *Inupiat Community of the Arctic Slope v. United States*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 68 (1985).

preserving the status quo as well as the district court's ability to fashion appropriate final relief would have been an imminently appropriate and necessary interim remedy. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981).

The Secretary and the oil companies had different ideas. In spite of their representation to the *Gambell I* court that an injunction was the proper remedy, they reversed their position on remand and argued that an injunction was not an appropriate remedy. They argued that Interior had fully and completely complied with the Conservation Act. The heart of their case was an inadvertent compliance claim. According to this notion, Interior had necessarily complied with all the requirements of the Conservation Act when it complied with the National Environmental Policy Act and the Outer Continental Shelf Leasing Act.

The district court rejected the inadvertent compliance argument but failed to issue the preliminary injunction which the remand order had so clearly contemplated. Expressing a natural skepticism that the Secretary could "inadvertently comply" with the Conservation Act, the district court judged that the Secretary had violated the statute on a number of counts. Chief among the violations were the Secretary's failure to prepare subsistence studies for the two challenged lease sales with the precepts of the Act clearly in mind and his failure to give the notice, hold the hearings, and make the findings required by sections 810(a)(1)-(3) of the Conservation Act. Nevertheless, the district court failed to enter the injunction requested by the tribal villages. Without explaining or elucidating its reasoning or rationale, and without expressly balancing the equities, it summarily concluded that an injunction was not an appropriate remedy in the case.

The court of appeals reversed. Noting that Interior and the oil companies had previously represented to it that an injunction was the appropriate remedy, it proceeded to balance the equities. It found that the balance tipped decidedly in favor of the tribal villages. Moreover, it found that the public interest, as expressed in the Conservation Act, favored granting the injunction. On the basis of these traditional equitable principles, it ordered the

district court to enter an injunction and once again remanded the case for a determination as to whether the lease sales should be voided.

The Secretary and the oil companies have now petitioned this Court for a writ of certiorari reviewing this decision as well as the decision in *Gambell I*. The petitions seek review of the conclusion, reached in *Gambell I*, that Title VIII applies outside the territorial waters of the State of Alaska. They further seek review of the *Gambell II* decision. Here the issues relate to the appropriateness of the lower court's balancing of the equities, the correctness of its construction of the Conservation Act, and its application of the Act to a lease sale which occurred after *Gambell I* was filed and submitted for decision but before the court's resulting opinion was published.

REASONS FOR NOT GRANTING THE WRIT

I

THIS CASE IS A TEMPEST IN A TEACUP

The Secretary and the oil companies strongly suggest that this case presents important practical and legal issues. They allege that this case may seriously disrupt the nation's quest for energy independence and that, at the least, it involves leases whose value approaches four billion dollars. Further alleging that this mischief is created by the Conservation Act, the Secretary and the oil companies also suggest that any issues associated with that Act, no matter how trivial in the abstract, must likewise be so important as to warrant review by this Court.

These claims grossly exaggerate both the practical and legal implications of the case, creating a virtual tempest in a teacup. The supposed legal importance of the case is difficult to ascertain. The legal issues presented for decision are mundane and highly idiosyncratic. Possessing little relevance outside the narrow parameters actually presented for review, the legal issues cannot credibly produce the draconian consequences to which the petitioners allude. Nor does the case possess any practical importance. Exploration has proven that the actual lease tracts at issue contain no oil. For future leases, the substantive decision in the case merely requires Interior to comply with a fairly short and straightforward statute. That compliance effort does not pose a realistic threat to the nation's energy program or to its economic health.

This case certainly is of little immediate consequence, for the leased tracts at issue here hold out no promise of ever producing commercial quantities of oil and gas. Through adroit and facile legal maneuvering, the oil companies have completed exploratory drilling on the most promising of their tracts. That exploration has resulted in dry hole after dry hole — ample and convincing proof that the tracts likely contain no commercial quantities of oil and gas. Indeed, one irony of this case is that, in retrospect, the oil companies and the nation's economy would have undoubtedly been best served if the district court

had enjoined the lease sales. This would have at least prevented the oil companies from squandering resources exploring for oil on tracts where the probability of finding oil asymptotically approaches zero. A second irony is that, having obtained the information needed to reach that conclusion, the oil companies have every incentive to reverse their position one last time and claim that the sales should be voided — a remedy that would permit them to recover their misspent bid money.

This case similarly possesses little importance for future lease sales. The lower court held that Interior had to comply with a simple and short statute requiring that OCS leasing not unreasonably interfere with the subsistence fishing and hunting rights of Alaska's aboriginal people. This compliance effort will concededly change the contours of some OCS lease sales, for it requires the deletion of tracts which are important for subsistence but which hold a low potential for oil and gas. It will concededly delay OCS leasing in Alaska by requiring that Interior identify subsistence uses and needs before leasing occurs. In some extreme cases, it may prohibit unnecessary lease sales.

But these consequences are relatively insignificant. Leasing in a manner that minimizes the conflict between subsistence uses and oil and gas development is a sound idea. The Secretary should adopt it regardless of the existence of the Conservation Act. Moreover, delays attributable to adopting such a plan are of no great moment. The economic health of the country does not demand an expedited development of the Alaskan OCS. The cost of producing a barrel of oil in the Alaskan OCS ranges upwards of $40. The oil companies need approximately fifteen to twenty years to develop producing oil wells in that inhospitable and environmentally sensitive area. Current oil prices are hovering at $10-$15 per barrel; production of Alaskan OCS crude lies fifteen years in the future. The economic incentives for developing the Alaskan OCS are currently so low that within the last year Interior has twice canceled scheduled sales for lack of industry interest.[29] In this economic climate, expeditiously leasing the Alaskan OCS is certainly not a pressing national need.

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[29] The Anchorage Daily News, April 29, 1986 at B6.

Interior should encounter few problems when complying with the statute. The Conservation Act has applied to federal oil leases since 1980. Since that date, Interior has recognized that it controls disposal of the vast federal land holdings located on the Alaskan mainland. The agency has applied the statute to countless land disposals and offered countless leases for sale during this period. Not one disposal or lease has been prevented by the Conservation Act. Interestingly enough, the only Conservation Act challenge to a mainland lease sale was rejected by the same lower court which the Secretary would have this Court believe is unreasonably prejudiced against him. *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984).

Interior would best serve the public interest as well as all private interests by ending its pointless and unproductive judicial wrangling and by implementing a compliance program. Interior has proven that it can comply with the Conservation Act when it wishes. Yet it has chosen to take the low road in this case by refusing to comply with an inherently reasonable statute setting forth a sound management plan for the use of Alaska's natural resources. Its course has been folly. After three years of expensive and time-consuming litigation, no one is better off. The Secretary's OCS program in Alaska has been disrupted. The oil companies have been subjected to unnecessary delays and uncertainty. Alaskan Natives' subsistence needs have been virtually ignored. The better alternative is clear. The Secretary can promote all relevant interests by complying with the Conservation Act. Interior possesses the power to expeditiously lease the Alaskan OCS. It need only drop its recalcitrance and resolve to fairly and conscientiously address the subsistence needs of Alaskan Natives.

II

THE PETITIONS ARE UNTIMELY TO THE EXTENT THEY SEEK REVIEW OF THE DECISION THAT THE CONSERVATION ACT APPLIES TO OCS LEASING

The Secretary and the oil companies have requested review of *Gambell I's* determination that Title VIII of the Conservation Act applies to the OCS. In addition to raising an unimportant issue that has been settled for virtually two years, the petitions on this issue are untimely.

The rules governing timeliness are straightforward. Rule 20 provides that a petition for a writ of certiorari to review the judgment of a federal court of appeals shall be deemed in time "when it is filed with the Clerk within 60 days after the entry of such judgment." Sup. Ct. R. 20.1. That Rule further provides that "the time for filing a petition for a writ of certiorari runs from the date the judgment or decree to be reviewed is rendered, and not from the date of the issuance of the mandate." Sup. Ct. R. 20.4.

The judgment concerning the geographic scope of the Conservation Act was rendered on November 2, 1984. As noted by the petitioners, the court of appeals in *Gambell I* determined that Title VIII of the Conservation Act applied to the OCS on that date. This issue was not subsequently presented to the *Gambell II* court, and that court understandably did not pass on it.

The petitions on the issue of the geographic scope of the Conservation Act are therefore late. The only lower court judgment or decree dealing with whether the Conservation Act applies to the OCS was rendered on November 2, 1984. The time for seeking a writ of certiorari reviewing that decree ran on January 31, 1985. The decree cannot be reviewed by a petition filed in February of 1986.

This conclusion is supported by none other than the Solicitor General himself. After *Gambell I* was decided, the Solicitor requested of this Court an extension of time in which to file a petition for certiorari reviewing the judgment that Title VIII of the Conservation Act applied to the OCS. That request, reproduced below, concedes that the time for reviewing the *Gambell I* decision ran on March 2, 1985. It states:

The Solicitor General, on behalf of the Secretary of the Interior and the Department of the Interior, respectfully requests an extension of time, to and including March 2, 1985, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on November 2, 1984. A copy of the court's opinion is attached hereto. Unless extended, the time for filing a petition for a writ of certiorari will expire on January 31, 1985. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3120, establishes procedural requirements to be followed by federal land managers in order to harvest fish and wildlife. These requirements apply only to "land situated in Alaska," "title to which is in the United States" (16 U.S.C. 3102 and 3120). The question presented by this case is whether the seabed and subsoil of the Outer Continental Shelf fall within this definitional limitation, in light of the fact that the Outer Continental Shelf is outside the boundaries of the State of Alaska and the United States claims only sovereign rights to explore and exploit the resources of the Outer Continental Shelf but not ownership. The court of appeals held, inter alia, that ANILCA's procedural protections for subsistence activities do apply to Outer Continental Shelf lands and water contiguous to the State of Alaska. The decision of the court of appeals may be read to create a conflict between ANILCA and the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* The decision may also inject new legal requirements and procedures into existing statutory schemes for managing ocean resources in a manner not intended by Congress.

Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, January 18, 1985.

This Court granted the Solicitor's request for an extension of time in which to seek review of the decision that the Conserva-

tion Act applies to OCS leasing. Electing not to seek review of the decision, the Solicitor permitted the deadline for the certiorari petition to pass. Interior then acquiesced in the decision by conceding that it was the correct rule of law on remand. Following *Gambell I,* the Secretary did not controvert the judgment that the Conservation Act applied to OCS leasing, either in the district court or the court of appeals. The oil companies similarly did not argue that *Gambell I* was wrongfully decided in either court.[30]

The Secretary's and the oil companies' failure to relitigate whether the Conservation Act applies to OCS leasing precludes their now petitioning for a writ of certiorari on that issue. Central to the relationship between higher and lower courts is the precept that, with limited exceptions, a higher court will not review an issue not presented to the inferior tribunal by the losing party.[31] The precept applies in this Court. An unbroken string of decisions previously issued by this Court holds that "[w]hen the issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 146 n.2 (1970). *Accord, e.g., Youngberg v. Romero,* 457 U.S. 307, 316 n.19 (1982); *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958); *Husty v. United States,* 282 U.S. 694 (1931); *Duignan v. United States,* 274 U.S. 195 (1927).

The corollary to this rule is that a party losing an appeal must preserve the issue on remand in order to later petition for certiorari. The mechanics of the process are straightforward.

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[30] The oil companies' brief to the *Gambell II* court did indicate, by means of a one sentence footnote, that they "reserved" the argument that the Conservation Act did not apply to the OCS. An otiose reference at best, the footnote constitutes not the affirmative presentation of the issue contemplated by the Federal Rules. *E.g., Chicago & Western Indiana R.R. Co. v. Motorship Buko Maru,* 505 F.2d 579, 581 (7th Cir. 1974).

[31] The relationship dictates that the higher court will, however, affirm on any grounds, including those not relied upon or even considered by the lower court. *E.g., Hankerson v. North Carolina,* 432 U.S. 233, 240 n.6 (1977); *Massachusetts Mutual Life Ins. Co. v. Ludwig,* 426 U.S. 479, 480-81 (1976); *Dandridge v. Williams,* 397 U.S. 471, 475-76 n.6 (1970); *Langnes v. Green,* 282 U.S. 531, 535-39 (1931).

Following the remand, the issue must be re-presented to the trial court and, where an appeal is possible, re-presented to the appellate court. Only after perfecting the appeal in this manner may the party petition for certiorari. The two cases cited by the Solicitor — *Reece v. Georgia*, 350 U.S. 85 (1955) and *Falk v. Brennan*, 414 U.S. 190 (1973) — establish precisely this point. Those decisions hold that petitioning parties must preserve their rights after the remand by relitigating the lost issue in the trial court and, when appropriate, in the court of appeals. *See also Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

The petitions with respect to whether the Conservation Act applies to the OCS are untimely. *Gambell I*, decided more than two years ago, held that the Act applied to the OCS. The time for petitioning for a writ of certiorari reviewing that decision ran over a year ago. Neither the Secretary nor the oil companies relitigated that issue in either the district court on remand or in the court of appeals in *Gambell II*. Having failed to present the issue to the *Gambell II* court, they cannot request that this Court review an issue decided two years ago and not preserved after the remand.

III

THE PETITIONERS CANNOT COMPLAIN ABOUT AN INJUNCTION WHICH ISSUED AT THEIR REQUEST

The Secretary and the oil companies have also petitioned for a writ of certiorari reviewing the court of appeals' determination that exploratory and developmental activities on tracts leased in violation of the Conservation Act should be enjoined. Review of this issue should be denied because the lower court issued the injunction at the Secretary's and the oil companies' behest.

The facts establish that the petitioners requested the injunction ordered by the *Gambell II* court. During the appeal of *Gambell I,* the tribal villages requested that the court of appeals void the Norton Sound lease sale. They contended that the Secretary had failed to comply with the statutory prescription of the Conservation Act before the sale and that, in light of the pertinent statutory language, he could not comply afterwards. The Secretary and the oil companies vigorously disagreed. To protect the lease sale, they requested that the court enjoin exploration and development rather than void the sale if it concluded that the Conservation Act applied to OCS leasing. 774 F.2d at 1417.

The *Gambell I* court declined to rule on this issue. Expressing the opinion that the issue involved significant legal as well as factual issues, it remanded the case to the district court for a decision as to whether the sale should be voided or whether exploratory and developmental activity should be enjoined. The remand order clearly circumscribed the district court's available choices. Under the order, the district court could either: (1) void the sale; or (2) enjoin all exploration and development until such time as the Secretary complied with the statute. *See* 746 F.2d at 582-83.

The *Gambell II* court relied heavily on this aspect of *Gambell I* when it reversed the district court's denial of a preliminary injunction. Quoting extensively from both the Secretary's and the oil companies' briefs in *Gambell I,* the *Gambell II* court judged that the Secretary and the oil companies had previously requested the injunction. 774 F.2d at 1417. It further judged that they could not abandon that position following the *Gambell I*

remand order merely because it was in their interest to do so. On this basis, the lower court determined that a preliminary injunction should issue until the district court either permanently enjoined exploration and development or voided the sale.

The record indicates that the lower court's decision to enjoin exploratory and developmental activity was dictated by the litigation position adopted by the Secretary and the oil companies. To a large extent the petitions submitted by the Secretary and the oil companies present a false portrait of the issue put to the *Gambell II* court. Implicit in their petitions is the suggestion that the court of appeals had placed before it a choice of enjoining exploration and development or not enjoining these activities. This is inaccurate. The choice presented to the lower court was between voiding the sales or enjoining exploration and development. The tribal villages asserted that the statutory language of the Conservation Act demanded that the court void the challenged sales. The Secretary and the oil companies argued that enjoining exploration and development was the appropriate remedy.

Because the Secretary and the oil companies requested that the court of appeals issue a permanent injunction, they have no ground for petitioning for review of its decision to issue a preliminary one. The Secretary and the oil companies requested that the court of appeals permanently enjoin exploration and development rather than void the sale. Pursuant to their request, that court ordered the district court to seriously consider whether they were entitled to have exploratory and developmental activities enjoined or whether the sale should be summarily voided. Having persuaded the lower court to at least consider their request for a permanent injunction enjoining exploration and development, the Secretary and the oil companies can hardly be heard to complain that the court entered a preliminary injunction enabling them to make their case on why the sale should not be voided. Surely the court of appeals is entitled to more gratitude than this.

IV

THE COURT OF APPEALS DID NOT APPLY A PER SE INJUNCTION RULE

The Secretary and the oil companies' petitions for a writ of certiorari reviewing the court of appeals' application of a *per se* injunction rule should be denied for an additional reason: namely, that the court of appeals did not apply such a rule.

The lower court's opinion details the standards the court applied when it evaluated the tribal villages' claim for preliminary injunctive relief. Contrary to the Secretary's and the oil companies' assertions, it irrefragably provides that the lower court used a traditional test which considered the probability of success on the merits, the balance of the equities, and the public interest. The opinion states:

> A. *Applicability of the Traditional Test*
>
> This court has recognized two sets of standards for evaluating a claim for injunctive relief. We refer to one as the "traditional" test and the other as the "alternative" test. *American Motorcyclist Ass'n v. Watt,* 714 F.2d 962, 965 (9th Cir. 1983). In *American Motorcyclist Ass'n* we described the traditional test as follows: "The traditional equitable criteria for determining whether an injunction should issue are (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; (3) does the public interest favor granting the injunction?" *Id.* at 965.
>
> "The 'alternative' test permits the moving party to meet its burden by demonstrating either a combination of probable success and the possibility of irreparable injury or that serious question are raised and the balance of hardships tips sharply in its favor." *Id. (citing Benda v. Grand Lodge of IAM,* 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 88 (9th Cir. 1975)).

> We have concluded, however, that the traditional and the alternative tests are "not really two entirely separate tests, but that they are merely extremes of a single continuum." *Benda v. Grand Lodge of IAM,* 584 F.2d at 315. *Accord, Regents of University of California v. ABC,* 747 F.2d 511, 515 (9th Cir. 1984); *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1200 (9th Cir. 1980). We have also noted that "[t]he difference between the two formulations is insignificant. Therefore, we accept either as satisfactory." *Benda,* 584 F.2d at 315. Because the district court employed only the traditional test, we will review the findings under that formulation. *See Regents of University of California v. ABC,* 747 F.2d at 515-16 n.4 (where the district court made a finding that the public interest favored the issuance of the preliminary injunction, this court reviewed the district court's findings under the traditional standard).

774 F.2d 1414, 1419 (9th Cir. 1985).

The decision to issue the injunction flowed naturally from the application of this traditional test. The court of appeals first determined, presumably to no one's surprise, that Interior had failed to comply with a statute that it had consciously refused to apply to OCS leasing. It then proceeded to the balance of equities. Here it found that the Secretary's violations of the Conservation Act constituted irreparable harm. *See id.* at 1422-1425. It also found that the "by-products of oil and gas exploration such as potential oil spills, leakage, and noise" threatened to disrupt subsistence hunting and fishing to the extent that it could "destroy irreparably the isolated and unique culture of the Native Alaskans." *Id.* at 1426. Since neither Interior nor the oil companies offered any evidence indicating that they would suffer irreparable harm if the injunction issued, the court concluded that the balance of the equities tipped sharply in favor of the tribal villages. The court then ended its inquiry by considering the public interest. On this issue, the court judged that the best expression of the public interest was contained in the Congressional prohibition against leasing in a manner that unreasonably restricted subsistence uses. It further judged that

the public interest would be best served by requiring that the Secretary follow the controlling statutory requirements. *See id.* at 1425-26.

This decision simply does not support a petition to review an ostensible application of a *per se* injunction rule. The only aspect of the opinion which might conceivably be *per se* is the conclusion that violations of statutory prohibitions are judicially cognizable harms which must be considered in determining whether injunctive relief is appropriate in a given case. This long-standing presumption is the governing rule in this Court as well as in every circuit court of appeals. *E.g., Weinberger v. Romero-Barcelo,* 456 U.S. 305, 315 (1982); *TVA v. Hill,* 437 U.S. 153, 193-96 (1978); *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975); *United States v. City and County of San Francisco,* 310 U.S. 16, 30-31 (1940); *Foundation On Economic Trends v. Heckler,* 756 F.2d 143, 157 (D.C. Cir. 1985); *Alaska v. Andrus,* 580 F.2d 465, 485 (D.C. Cir.), *vacated in part as moot sub nom. Western Oil and Gas Association v. Alaska,* 439 U.S. 922 (1978); *Massachusetts v. Watt,* 716 F.2d 946, 952-53 (1st Cir. 1983); *Sierra Club v. United States Army Corps of Engineers,* 701 F.2d 1011, 1034-35 (2d Cir. 1983); *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 443 (5th Cir. 1985); *United States v. City of Painesville,* 644 F.2d 1186, 1193-94 (6th Cir. 1981); *Wisconsin v. Weinberger,* 745 F.2d 412, 425-28 (7th Cir. 1984). *See* Plater, *Statutory Violations and Equitable Discretion,* 70 Cal.L.Rev. 524 (1982). It cannot realistically be viewed as presenting a substantial issue needing reaffirmation on yet one more occasion.

The petitioners' real quarrel is with their failure to make a record demonstrating they would suffer irreparable harm if the injunction issued. Their complete and absolute inability to construct such a record is remarkable. Certainly the Secretary never claimed he would suffer any harm. In both the district court and the court of appeals he stood silent, tacitly conceding that the government would not suffer any harm should the injunction issue. 774 F.2d at 1424-25. Nor did the oil companies do much more. For their part, they argued that they would be harmed by financial losses that would accrue from disrupted contracts signed after *Gambell I* was decided. Properly ignoring this harm,

the court of appeals applied the invariant rule that a party cannot alter the balance of hardships by bootstrapping itself into a position of harm.

In summary, the record in this case does not reveal that the lower court applied a *per se* injunction rule. Precise and explicit, it unquestionably demonstrates that the injunction issued because the petitioners failed to show any irreparable harm associated with the issuance of an injunction. The lower court's decision to issue the injunction was not — as the Secretary and the oil companies claim — a function of the application of a *per se* rule. It was merely the normal and expected result which obtains from balancing the equities when one side puts nothing on the scales for the weighing.

V

THE LOWER COURT'S DECISION THAT THE CONSERVATION ACT APPLIES AT THE LEASING STAGE DOES NOT PRESENT A SERIOUS LEGAL QUESTION

Both the Secretary and the oil companies have requested that this court review the Ninth Circuit's decision holding that the Conservation Act applies at the leasing stage. Relying on *Secretary of the Interior v. California,* 464 U.S. 312 (1984), they allege that the Conservation Act should be construed to apply only to exploration and development. Pushing the analogy between different statutes beyond all reason, they further allege that the lower court's decision in this case conflicts with this Court's decision in that one.

The argument that this case conflicts with *Secretary of the Interior v. California* is specious. The issues presented by the two cases are not remotely similar. *Secretary of the Interior* resolved the timing question of when the Coastal Zone Management Act applied to OCS leasing. That statute requires a consistency determination whenever an administrative action "directly affects" the coastal zone. This Court held that the phrase "directly affects" contemplates an action which results in an immediate and actual physical effect on the coastal zone. Since leasing does not technically effect such an impact, this Court found that the requirements of the CZMA were not triggered by activities associated with that leasing. This case presents no similar timing question. Section 810 of the Conservation Act dictates that compliance must precede leasing. Its terms mandate that the Secretary perform certain studies, initiate certain procedures, and make certain findings. Its terms further mandate that these actions must occur before he decides to lease or before he issues leases. Resolved by the plain language of the statute, the timing question of when the Conservation Act applies to OCS is simply not an issue.

In this regard, the conclusion that the Conservation Act applies at the leasing stage cannot be credibly controverted. The plain language of the statute provides that in the time/space

continuum in which leasing occurs, compliance with the statutory mandates of the Conservation Act must be accomplished before leasing decisions are made, or, in the most extreme case, before any lease issues. It requires the Secretary to complete and then consider extensive studies "*[i]n determining to lease* public lands under any provision of law authorizing such actions." 16 U.S.C. § 3120 (emphasis added). Flatly prohibiting some types of leasing, it further provides that "*[n]o lease* of such lands which would significantly restrict subsistence uses shall be effected" unless and until the Secretary undertakes the procedures and makes the findings specified by section 810(a)(1)-(3). *Id.*

The statutory language resolves all questions relating to the timing of a Conservation Act compliance effort. Embodying specific and direct commands, the statute requires that effort before leasing occurs. And, as the courts of appeals have unanimously held, a compliance effort at the leasing stage must consider the effects attributable to leasing as well as all other actions flowing naturally from that leasing. *See, e.g., North Slope Borough v. Andrus,* 642 F.2d 589 (D.C. Cir. 1980); *Massachusetts v. Watt,* 716 F.2d 946 (1st Cir. 1983); *Conservation Law Foundation v. Andrus,* 623 F.2d 712 (1st Cir. 1979); *Massachusetts v. Andrus,* 594 F.2d 872 (1st Cir. 1979); *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Sierra Club v. Morton,* 510 F.2d 813 (5th Cir. 1975); *Village of False Pass v. Clark,* 733 F.2d 605 (9th Cir. 1984).

From a broader perspective, the question presented by this case is whether any compliance effort is required at the lease stage. It is not whether a specified compliance effort is sufficient to meet stringent statutory requirements unreasonably established by the court of appeals. In their petitions, the Secretary and the oil companies suggest that Interior made at least a feeble attempt to comply with the Conservation Act before holding the lease sales at issue. This suggestion is false. Prior to these sales, the Secretary consciously refused to comply with the Conservation Act. After concluding that the Act did not apply to OCS leasing, he ignored its statutory directives. In light of the statutory language which states that compliance must occur

"*[i]n determining to lease,*" Interior's claim that it did not have to comply with the Act before issuing leases hardly presents a dignified and legitimate legal issue — much less one important enough to warrant the attention of this Court.

VI

THIS CASE DOES NOT INVOLVE A RETROACTIVE APPLICATION OF THE CONSERVATION ACT

Finally, the Secretary as well as the oil companies have petitioned this Court for review of what they claim is a retroactive application of the Conservation Act to sales which were held after Congress enacted that statute but before the court of appeals decided *Gambell I*. They allege the decision to apply the Conservation Act to those sales would violate this Court's opinion in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The record unequivocally demonstrates that this question is not presented by this case. The operative, controlling, and uncontroverted facts are set out by the lower court's opinion. They are as follows. Congress passed the Conservation Act in December of 1980. *Gambell I* was filed on March 4, 1983, about two years later. It was submitted to the court of appeals following oral argument on October 7, 1983. While the case was submitted, the Secretary determined to hold another lease sale. He did so "with knowledge that his right to do so without complying with the Conservation Act was in doubt." 774 F.2d at 1427. The oil companies that were parties to *Gambell I* bid on the leases offered at this sale. They placed their bids "with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending." *Id.*

These facts do not support the claim that the lower court applied a novel interpretation of the Conservation Act to lease sales held before the Secretary had notice that his interpretation of the Conservation Act would be challenged. This case involves only two lease sales. One was subjected to a Conservation Act challenge before it was held. The other was held after *Gambell I* was submitted — at a time when both the Secretary and the oil companies had constructive as well as actual notice of the potential problems associated with holding an OCS lease sale in Alaska without complying with that Act. Since the two sales at issue here were held after all parties had notice of the Conservation Act challenge, this case does not involve the issue of whether the

Conservation Act should be applied retroactively.[32] Rather than embodying a retroactive application of a new and unexpected statutory interpretation, the lower court's decision merely illustrates the established rule that a litigated case acts as a *lis pendens,* placing on notice all bidders at sales held subsequent to its filing. *E.g., Conservation Law Foundation v. Andrus,* 623 F.2d 712, 720 (1st Cir. 1979); *North Slope Borough v. Andrus,* 486 F. Supp. 326, 331 (D. D.C. 1979).

CONCLUSION

The petitions for certiorari should not be honored. This case has little practical importance in the current economic climate. The legal issues upon which review has been requested are untimely, unimportant, and not presented by the record and facts of this case.

Respectfully submitted,

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[32] No case has raised a Conservation Act challenge to an OCS sale held before *Gambell I* was filed.